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84-653

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERTA SCHLEIFER,

Petitioner,

vs.

THE CHILDREN'S MEMORIAL HOSPITAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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October 22, 1984

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QUESTION PRESENTED FOR REVIEW

Was it Error for the District Court, Sustained by the Court of Appeals, to Admit Expert Testimony to Impeach the Competence or Credibility of the Plaintiff in an Action Brought Under 42 U.S.C. 2000 e?

PARTIES IN THE COURTS BELOW

The parties identified in the caption of the PETITION FOR WRIT OF CERTIORARI were all the parties represented in the Court of Appeals and the District Court.

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OPINIONS BELOW

Neither the Memorandum Opinion and Order of the District Court for the Northern District of Illinois, nor the Order of the Court of Appeals for the Seventh Circuit is reported. Both are set out in full in the Appendix as Appendices B and A, respectively.

JURISDICTIONAL STATEMENT

The dispositive Order of the Court of Appeals for the Seventh Circuit was entered on July 24, 1984. No rehearing was sought in the Court of Appeals.

This Court has jurisdiction to issue its Writ of Certiorari to the Court of Appeals for the Seventh Circuit under the provisions of 28 U.S.C. Section 1254(1). Time for the filing of a Petition for Writ of Certiorari is governed in this case by 28 U.S.C. Section 2101(c) and will expire on October 22, 1984.

FEDERAL RULES OF EVIDENCE INVOLVED

Rule 104. Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 601. General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has

personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

STATEMENT OF THE CASE

Initial Federal Court Jurisdiction

This case was a claim under 42 U.S.C. Section 2000e. Jurisdiction was proper under 28 U.S.C. Sections 1331 and 1343(3).

Statement of The Case

This civil rights action was brought in the United States District Court for the Northern District of Illinois, a right-to-sue letter having first been received by the Plaintiff, Roberta Schleifer. The Plaintiff alleged that she was terminated from employment on August 23, 1977, and that she was the victim of sex discrimination in the terms and conditions of her employment at the Children's Memorial Hospital, ("Hospital") a not-for-profit health care corporation operating in Chicago, Illinois. The Plaintiff, a Cardiac Catheterization Laboratory technician specifically alleged that she was:

a) terminated from employment for trivial or non-existent reasons, which standards were not applied to similarly situated male employees;

b) paid less during her employment than the prevailing wages paid to male employees at the Hospital for doing the same work; and

c) subjected to sexual advances and remarks, and physical contact from her supervisory physicians and co-workers the acquiescence in which she reasonably perceived to be a condition for advancement and continued employment.

Plaintiff's complaint prayed for an order directing her reinstatement with full benefits retroactive to the date of her termination, awarding her full back pay, and granting her reasonable costs and an attorney's fee.

Prior to her termination by the Hospital, Plaintiff received a 90-day leave of absence during which she was under the care of a psychiatrist. The Plaintiff was neither hospitalized nor institutionalized during the period of psychiatric treatment. She returned to work at the Cardiac Catheterization Laboratory after the leave expired in the Fall of 1976.

Plaintiff was ultimately terminated by the Hospital on August 23, 1977, after unsuccessfully grieving a suspension without pay. That suspension resulted, according to the Hospital, from a series of events, including failure of the Plaintiff to file her time cards properly, culminating in Plaintiff's failure to insert a temperature sensing device on a patient undergoing catheterization. The Plaintiff disputed the accuracy of those charges in her grievance and at trial; nonetheless, they remained the basis of Plaintiff's discharge on August 23, 1977.

During discovery, the Hospital subpoenaed the Plaintiffs' medical records from the period of her psychiatric care and deposed her treating psychiatrist, a Dr. Greenberg. Greenberg's deposition and records, together with the Plaintiff's deposition, were given to the Hospital's expert witness for evaluation. The Plaintiff was also interviewed by the Hospital expert.

When the case came on for trial, beginning on June 18, 1982, the Plaintiff testified on her own behalf. She testified that she was the object of unwanted sexual attention from her superiors and a co-worker. The following extracts from her testimony typify her testimony:

> I was working in the Cath Lab and he [Dr. Paul] just kind of came in and he started grabbing at my breast.

Trial Transcript ("Tr.") 207;

> he [Dr. Paul] put his hands on my thighs and he was kind of spreading my legs apart . . . he had his hands on me and I thought it was a rather peculiar thing to do when we were talking about a salary raise.

Tr. 212;

> he [Dr. Paul] began leaning against me, shoving me into the corner and rubbing himself up against me—I don't know if he was trying to kiss me or what.

Tr. 117; and

> Jon [Parlier] came over pretending to admire my necklace and he started making remarks that—[h]e came over and he picked up the necklace and he started making remarks that he had to be very careful not to touch me, my person. But then he put the necklace back down and he began to touch my breast instead.

Tr. 166-67.

The Plaintiff also gave testimony that she was given unfavorable work assignment in comparison with those given Parlier, whom she had trained.

As part of its case, the Hospital offered the testimony of its expert witness, a Dr. Cavanaugh. Cavanaugh, a psychiatrist, had interviewed the Plaintiff and had reviewed her deposition and that of Dr. Greenberg, together with Greenberg's records. Ostensibly Cavanaugh's testimony was pertinent, according to the Hospital's argument put forth on its Brief on appeal to the Court of Appeals, because of the Plaintiff's prayer for reinstatement as part of the relief requested in the Complaint, because the plaintiff had put her mental condition in issue in her complaint, and because Schliefer's mental condition was highly relevant to her credibility as a witness.

The Plaintiff objected to Dr. Cavanaugh's testimony for any purpose. That objection notwithstanding, the trial court admitted the testimony of Dr. Cavanaugh without indication of the purposes for which it was admissible.

Dr. Cavanaugh testified, *inter alia,* that he had formed an opinion within a reasonable degree of medical certainty as to whether the incident of sexual harassment and physical mistreatment took place:

> My opinion is that these reports would be best understood and most accurately understood as by products or manifestations of a disturbed psychological or psychiatric state of mind.

Tr. 632.

> The basis of that opinion is my evaluation of Miss Schleifer, the review of all the records that I have alluded to, and, very importantly, my own clinical experience in working with individuals who have had

> this particular constellation of problems both in my clinical practice as well as in my administrative responsibilities as director of a psychiatric in-patient unit at a major medical center for approximately eight years.

Tr. 632-33. Dr. Cavanaugh also testified that, in his opinion, the Plaintiff was unsuited to return to work at the Hospital. Tr. 635.

Under cross-examination, Dr. Cavanaugh was unable to state which, if any, fact testified to by Plaintiff should be considered untruthful. The pertinent colloquy between Plaintiff's counsel and Cavanaugh goes:

> Q. Doctor, notwithstanding your opinion, is it correct that you cannot say whether in fact Miss Schleifer was or was not chronically late or whether in fact there were not incidents of sexual harassment or whether in fact she did or did not treat a particular patient or patients in the appropriate manner, isn't that correct?
>
> A. I cannot in fact speak to any of those individual specific events and that has not been the basis or thrust of my testimony today.

Tr. 658-59.

After a further exchange during which Dr. Cavanaugh reiterated that it was highly probable that the Plaintiff was making misperceptions regarding the events going on about her, the Court inquired:

> THE COURT: But you wouldn't know as to which specific events were misperceptions and which were actually correctly perceived, correct?
>
> THE WITNESS: That I could not do. I am speaking to the patterns of behavior and probabilities of occurrence.

Tr. 659. Dr. Cavanaugh did not qualify his testimony with respect to the point from which onward Ms. Schleifer was an unreliable observer.

In deciding the case, the District Court relied heavily on the testimony of Dr. Cavanaugh. Moreover, it appears that, despite the fact that neither the Plaintiff nor the Hospital regarded the Plaintiff's alleged mental illness as the cause of her discharge, the District Court relied on Cavanaugh's testimony to infer that mental impairment was the source of declining performance, resulting in Plaintiff's discharge on August 23, 1983. The relevant portion of the Court's decision are found in the District Court's Memorandum Opinion and Order, included in the Appendix hereto, at pages 6 through 8 of the Memorandum Opinion and Order. Significantly, the Court found the Plaintiff's demeanor on the witness stand excellent, (Memorandum Opinion and Order, 5) and that had the case rested on her testimony alone, she would have established her case. Memorandum Opinion and Order, at 5-6. Notwithstanding the Court's comment on the Plaintiff's demeanor, the District Court granted judgment to the defendant Hospital.

On July 25, 1984, the Court of Appeals for the Seventh Circuit affirmed the District Court in an Order issued pursuant to Circuit Rule 35, prohibiting publication of the decision. In its Order, the Court of Appeals reluctantly affirmed the admission of Dr. Cavanaugh's testimony for impeachment purposes.

This Petition for a Writ of Certiorari to review the Decision of the Court of Appeals affirming the District Court's decision, and specifically, its affirmance of the admissibility of Dr. Cavanaugh's testimony for impeachment purposes, followed on October 22, 1984.

ARGUMENT IN SUPPORT OF ALLOWANCE OF THE WRIT

A. Psychiatric Testimony Was Given Abnormal Weight and Significance in This Case.

An understanding of the importance of the issues raised by this case, and consequently, its importance for consideration by this Court, properly begins with a consideration of the impact of Dr. Cavanaugh's testimony on the Plaintiff's case.

Plaintiff's case, a claim of sexual discrimination and sexual harassment, actionable under 28 U.S.C. Section 2000e, crucially depended, because of its nature, on the testimony of the Plaintiff herself, and on the testimony of those accused of the misconduct. If the Plaintiffs' allegations were true, especially the allegations of sexual harassment, no disinterested occurrence witness might be available to corroborate the testimony of the Plaintiff or the Defendant. The probability that no disinterested witnesses will exist increases directly with the degree that the sexual harassment is furtive and clandestine. In such a case, the credibility of the witnesses is so important an issue that the greatest of care must be taken not to distort the weighing of testimony by instruments of assistance too powerful to be of genuine use to the trier of fact.

It must be kept in constant regard that, in accordance with Federal Rule of Evidence 702, the function of an expert witness is to assist the trier of fact in arriving at decisions concerning evidence; it is *not* the function of an expert to preempt the trier's fact-finding process. In the present case, it can scarcely be doubted that the District Judge so completely relied on the testimony of Dr.

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Cavanaugh challenging the competence of the witness that he discussed little other evidence in his Memorandum Opinion and Order. Particularly revealing are his comments concerning the demeanor of the Plaintiff as a witness:

> The Plaintiff's demeanor on the witness stand was excellent. She listened to the questions asked her and answered them directly. She was alert, and had a strength that kept her from withdrawing when under examination about her psychological problems. Had the case rested upon her direct testimony alone, she would have established that her termination was the culmination of years of plotting and mistreatment on the part of her male co-workers. But that was not the case.

Memorandum Opinion and Order, 4. Nonetheless, the District Court concluded

> . . . I find from *all the evidence* that there would be no doubt in the mind of the reasonable person that the Plaintiff's case is a tragic example of an employer slowly discovering that it had in a sensitive position an employee whose record of effectiveness began deteriorating after a number of years of responsible employment, who eventually had to be given 90 days of medical leave for what her treating doctors determined was a paranoia with "schizoid personality", "significant endozenous depression with increasing hallucinations". When she returned to work from her sick leave her conduct was not improved. She progressively became a serious occupational problem for the hospital. Her timing was erratic, she began absenting herself from the laboratory for long periods of time. She became unable to handle small matters consistently, such as maintaining the lab's stock of supplies, or maintaining them in regular or sensible places. Finally in June of 1971 [sic]; when acting as Cath Tech, it became her re-

> sponsibility to place a heating pad under a baby's body and insert a rectal temperature. During the procedure, Plaintiff failed completely to insert the rectal probe, and during the catheterization she recorded a body temperature that was so low as to be inconsistent with life without reporting the temperature to the doctor. Fortunately the attending nurses implemented an emergency procedure which kept the infant alive.[1] This almost "cracking-up" type of conduct worsened as the month of June, 1977 wore on.

The District Court's Memorandum Opinion and Order has been quoted at length to exemplify the pervasive and pernicious influence of the psychiatric testimony. Counsel for the Hospital, which offered Dr. Cavanaugh's testimony, specifically disclaimed offering the testimony to prove the cause of the Plaintiff's termination.[2]

Yet the District Judge employed Cavanaugh's testimony to construct an explanation of Plaintiff's behavior that he apparently believed was not only consistent with paranoid schizophrenia but constituted a ground for discharge as well.

The vice, it bears repeating, of impeaching psychiatric testimony is not that it is unhelpful, but that it overwhelms, a point covered by the Court of Appeals in its Order affirming the District Court.

> We are hesitant to approve the type of evidence used by the Hospital. The psychiatrist struck at the heart

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[1] With respect to this incident, the testimony does not support the District Court's findings, but that point is beyond the scope of this petition.

[2] MS. STILLMAN: Your honor, if I might object to this on the ground of relevancy. Miss Schleifer was not fired for her psychiatric condition. I have not offered the testimony [of Cavanaugh] for that purpose. Tr. 642.

> of Schleifer's case when he stated that her mental state likely prevented her from perceiving and recounting the truth. The psychiatrist concluded that Schleifer probably was not a credible witness. It is dangerous to suggest that psychiatrists are better judges of credibility than the trier of fact. And in any event, credibility determinations are reserved to the trier of fact and responsibility for such decisions should not be given to any witness. As the Ninth Circuit noted in *United States* v. *Barnard,* 490 F2d 907, 912 (9th Cir.)(*cert. denied* 416 U.S. 959 (1974), jurors when faced with such powerful psychiatric testimony, might forget their duty to carefully weigh all of the testimony and might lose sight of the central issues in the case.

Order, 5.

The invidiously prejudicial effect of Dr. Cavanaugh's testimony in the case can be summarized simply: Cavanaugh was permitted to testify not merely to mental conditions which might affect Ms. Schleifer's credibility; he testified that in his opinion she was not a credible witness and that events she had recounted were probably not true, despite the fact that he could not identify any individual element of her testimony as untrue.

> My opinion is that these reports would be best understood and most accurately understood as by products or manifestations of a disturbed psychological or psychiatric state of mind.

Tr. 632. Dr. Cavanaugh's testimony took the issue of the credibility of the Plaintiff Roberta Schleifer away from the Court and transmuted it into an issue of his *own* credibility. If the Court believed Cavanaugh, it must disbelieve Schleifer.

In its disbelief of Schleifer, the District Court apparently adopted without reservation Cavanaugh's medical "explanations" of the Plaintiff's testimony. In the view of the Court, she believed that what she testified to was true but in fact it was not. The events of sexual harassment recounted in her testimony were only imagined, the product of paranoia:

> Had the case rested upon her direct testimony alone, she would have established that her termination was the culmination of years of plotting and mistreatment on the part of her male co-workers. But that was not the case . . . The evidence is overwhelming that there was just no sex discrimination in this case. There was no mistreatment in regular employment matters because of plaintiff's sex. There just was no harassment because of her set [sic], and no termination because she wouldn't yield to the doctors' desires to "fondle her breasts."

Memorandum Opinion and Order, 4-5.

Whether it was the Hospital's intent that Dr. Cavanaugh's testimony should completely dominate the merits of the case is irrelevant; what is patently true is that the District Court, uncorrected by the Court of Appeals, used the testimony for far more than it was properly admissible under Federal Rule of Evidence 702.

The Court of Appeals' reluctance to approve the use of impeaching testimony was unaccompanied by any instruction on how and under what terms impeaching expert psychiatric testimony should have been received in a way that would restrict its influence to the purpose for which it might properly be admitted. In fact, the Court of Appeals failed to recognize that Dr. Cavanaugh's testimony did more than aid the court in weighing Ms. Schleifer's testimony, that it provided the bed-

rock foundation upon which the District Judge constructed his entire decision on the merits of the case.

B. This Court Should Limit the Circumstances in Which Impeaching Expert Psychiatric Testimony May be Admitted.

If only the decision of this case hung in the balance, it would be doubtful that sufficient ground exists to justify this Court's issuing its Writ of Certiorari. But regrettably, neither the decisions of this Court nor those of the several Courts of Appeals provide adequate guidance to the District Courts on the use of impeaching psychiatric testimony. This Court has never addressed the use of impeaching psychiatric testimony in either a criminal or civil case. Those Courts of Appeals that have addressed the issue have done so almost exclusively in the context of criminal cases where limitation on the use of expert psychiatric testimony to impeach a prosecution witness is overshadowed by a constitutional necessity of allowing a defendant to litigate his defenses fully and fairly. This case takes the issue well beyond those limits and prefigures what may be the expected course of development in civil litigation.

Although in *District of Columbia* v. *Armes*, 107 U.S. 519, 2 S.Ct. 840, 27 L.Ed 618, when this Court determined that the mentally ill were not incompetent to testify,[3] this Court has not addressed the issue of the use of psychiatric testimony for impeachment purposes under the Federal Rules of Evidence, in either a criminal or civil context. This court has declined to issue Writs of

[3] For the sound reason, and one not wholly unrelated to the present case, that if the mentally ill could not testify, who would offer evidence in cases of their abuse where only those suffers were witnesses to those events.

Certiorari to consider criminal cases in which the use of impeaching psychiatric testimony was an issue. *See: Gispert* v. *United States*, 445 U.S. 946, 100 S.Ct. 1345; 63 L.Ed. 2d 781 (1980); *Antoine* v. *United States*, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed. 2d 781 (1980); *Miller* v. *United States*, 446 U.S. 912, 100 S.Ct. 1842, 64 L.Ed. 2d 26 (1980); *Partin* v. *United States*, 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed. 2d 189 (1977); *Pacelli* v. *United States*, 424 U.S. 911, 96 S.Ct. 1106, 47 L.Ed. 2d 314 (1976); *Wertis* v. *United States* 422 U.S. 1045, 95 S.Ct. 2662 (1977); *Barnard* v. *United States*, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed. 2d 310 (1974); and *Sinclair* v. *Turner*, 405 U.S. 1048, 92 S.Ct. 1329, 31 L.Ed. 2d 590 (1972). This Court has granted a Writ of Certiorari to review *Barnes* v. *Jones*, 665 F.2d 427 (2d Cir. 1981) *sub nom. Jones* v. *Barnes*, 457 U.S. 1104, 102 S.Ct. 2902 (1982) a habeas corpus case arguing ineffectiveness of counsel, among whose omissions was a failure to make an offer of proof after a trial court ruling preventing him from cross-examining the complaining witness on his history of mental illness.

Neither do the decisions of the several district courts provide useful guidance. The reported decisions, including one District Court opinion, *United States* v. *Hiss*, 88 F.Supp. 559 (S.D. N.Y. 1950) are criminal cases where the defendant had sought to impeach a prosecution witness with evidence of mental illness, either through cross-examination, the introduction of medical records or the use of expert testimony. None deal with a civil case, much less a case under 42 U.S.C. 2000e alleging *inter alia*, sexual harassment. Moreover, none discussed in significant detail the operation of the Federal Rules of Evidence in governing the circumstances and procedures

of admissibility of impeaching expert psychiatric testimony.

The first reported federal case to confront the issue of the use of expert psychiatric testimony for impeachment is *United States* v. *Hiss,* 88 F. Supp. 559 (S.D. N.Y. 1950). The District Court, relying on *District of Columbia* v. *Armes,* 107 U.S. 519, 2 S.Ct. 840, 27 L.Ed. 618 (1882), decided that "[e]vidence of insanity is first for the judges on the preliminary question of competency but goes to the jury to affect credibility." 88 F. Supp. at 559. The District Court concluded that the weight to be given such testimony would be a matter on which a jury would be instructed. 88 F. Supp. at 560.

In *Sinclair* v. *Turner,* 447 F. 2d 1158 (7h Cir., 1971) the Court of Appeals for the Seventh Circuit determined that evidence of insanity or mental abnormality is admisible if pertinent to the time of observation of the facts the witness reports in his testimony, and may be proved by cross-examination or by extrinsic evidence. 447 F. 2d at 1162. Because the impeaching evidence sought to be admitted in *Sinclair* v. *Turner* was elicited through cross-examination, and because the Court held the questions of scope of cross-examination to be within the discretion of the Court, *Sinclair* v. *Turner,* offers little guidance to lower courts.

Neither does the more recent decision of the Court of Appeals for the Seventh Circuit in *United States* v. *Gutman,* 725 F. 2d 417 (7th Cir., 1984) where the Court held it no error to refuse to order a psychiatric examination of a prosecution witness who displayed a history of mental illness. Holding that a witness is not incompetent to testify by reason of insanity, citing Federal Rule of

Evidence 601, the Court of Appeals decided that it is within the discretion of the trial judge to hold a hearing on the mental competence of the witness, and that the judge had not abused his discretion in declining to do so. 725 F.2d at 420. Underlying the Court's analysis is the apparent assumption that an initial decision on competency is for the judge under Federal Rule of Evidence 104(a). If the witness is permitted to testify, his testimony is subject to analysis of credibility by the jury. Rejecting the defendant's argument that the testimony of one Odom, the prosecution witness subject to mental illness, should have been stricken because it was incoherent, the Court noted that credibility is for the jury to determine; if a witness speaks gibberish, the jury will recognize the testimony as such. Plainly *Gutman* provides little direction where, as in the present case, the testimony of the witness is not inherently incredible, but only becomes so if the impeaching psychiatric testimony is admitted.

United States v. *Pacelli*, 521 F. 2d 135 (2d Cir. 1975) is in accordance with *Gutman* in its holding that the ordering of a psychiatric examination of a prosecution witness is committed to the discretion of the court. *Pacelli* approved the District Court's decision not to allow impeaching expert psychiatric testimony regarding the mental state of a prosecution witness after hearing an examination of the psychiatric witness out of the presence of the jury.

In *United States* v. *Lopez*, 611 F. 2d 44 (4th Cir. 1979) the Court of Appeals affirmed the authority of the District Court to prohibit cross-examination of a prosecution witness on his psychiatric history under Federal Rule of Evidence 403, where the probitive value of the cross-examination would not justify the invasion of privacy of

the witness. *Lopez* does not disagree with the principle approved in *United States* v. *Glover,* 588 F. 2d 876 (2d Cir. 1978); *United States* v. *Honneus,* 508 F. 2d 566 (1st Cir. 1974) and *United States* v. *Partin,* 493 F. 2d 250 (5th Cir. 1974) requiring that the mental incapacity sought to be proved through impeaching evidence bear upon the capacity of the witness to observe and record information during the time about which he is expected to testify; *Lopez* simply holds that where relevancy is otherwise met, the Court may nonetheless exclude testimony under Rule 403 when probative value is slight.

None of the cases of the several Court of Appeals discuss the interplay of evidentiary rules 104(a), 601, 403, 602, and 702 applied to civil cases. When a party seeks to impeach the competence or credibility of a witness, especially the credibility of another party, by the use of an expert, he seeks under Rule 702 to introduce evidence either to disqualify the witness under Rule 602 or to discredit the witness's testimony. The trial court must make several determinations. First, the court must determine if the testimony of a psychiatrist would be helpful on the issue of competence, a matter given to the Courts by Rule 104(a). If the witness is found competent to testify, the Court may still need to determine if psychiatric evidence bearing on credibility is useful under Rule 702 or, if useful, unduly prejudicial under Rule 403. It must be borne in mind that unless the question of competence is raised, the witness will be presumed under Rule 601 to be competent.

Proffered expert psychiatric testimony going to the competence or credibility of a party can be potentially disastrous to that party. Guidance to the trial courts on

the limited purposes of the testimony, coupled with procedural controls to determine when expert psychiatric testimony can be received is imperative. Risks of abuse increase because of the increasing availability and supposed desirability of expert psychiatric testimony. The risks are especially grave for plaintiffs under U.S. C. 2000e, whose opponents are typically institutions, private, corporate or governmental, whose power to engage in protracted and expensive discovery, and to employ costly private consultants can be wielded unequally and unmercifully against private plaintiffs of limited means. Every plaintiff who acknowledges a history of mental impairment or who claims psychological injury from discriminatory practice becomes a target for the use of impeaching expert psychiatric testimony. Where, as here, the Plaintiff alleges sexual harassment, the misuse of impeaching expert psychiatric testimony threatens the ability of plaintiffs to vindicate important civil rights by a means accorded them by Congress.

CONCLUSION

For the reasons set forth herein, Roberta Schleifer respectfully requests this court to issue its Writ of Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit affirming the judgment of the District Court for the Northern District of Illinois in this cause.

Respectfully submitted,

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October 22, 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

(Argued May 9, 1984)

July 24, 1984

Before

Hon. William J. Bauer, Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Richard B. Kellam, Senior District Judge

ROBERTA SCHLEIFER,

Plaintiff-Appellant,

No. 83-1732 vs.

THE CHILDREN'S MEMORIAL HOSPITAL,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 4480
James B. Parsons, Judge

ORDER

Plaintiff Roberta Schleifer sued Defendant Children's Memorial Hospital for sex discrimination in employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000 (e) (1978). The district court, after a bench trial, ruled for the Hospital. We affirm.

I.

Schleifer worked in the Hospital's catheterization laboratory beginning in 1968. She worked as a technician; her duties included preparing patients for the catheteriza-

tion procedure, monitoring various devices and reporting any problems to the attending doctors, and processing the films taken during the procedures after their completion. The laboratory conducts cardiac catheterization, which involves insertion of a tube into a vein or artery and advancing it into the heart. Doctors then can use the tube to conduct various tests for the purpose of diagnosing heart abnormalities. The procedure, which can last for several hours, involves some risk. That risk is nominal when the procedure is conducted under tightly controlled conditions by experienced doctors and assistants.

In 1971, the Hospital hired a man to work with Schleifer. Schleifer trained the new employee, and he assumed most of the same duties as Schleifer plus the responsibility of maintaining the laboratory's electronic equipment. The new employee had a bachelor's degree in electronic engineering.

On June 1, 1977, Schleifer was involved in an incident in the laboratory that in part led to her termination. Schleifer prepared an infant for the catheterization procedure, but did not insert a rectal probe. The probe is necessary to monitor the patient's body temperature. The infant survived the procedure. Schleifer nevertheless soon was relieved of her duties in the laboratory. Schleifer filed a grievance with the personnel director at the Hospital on June 15. The personnel director conducted a meeting that day with Schleifer, the employee relations manager, and the doctors in charge of the catheterization laboratory. After the meeting Schleifer was suspended from all duties. Another meeting was conducted in mid-July, and in August Schleifer was fired. Her termination letter stated that she failed to perform specified duties including the June 1 incident, failed to follow established department procedures (refusing to put her time card in its rack), and frequently was late for work.

Schleifer alleged in the district court that she was paid less than the prevailing rate paid to men, that she was required to do less attractive work than the male employee she trained, that she was discharged on a pretense because she is a woman, and that she was sexually harassed by the doctors and her co-worker.

II.

On appeal, Schleifer argues that three trial court errors require reversal. First, Schleifer argues that the district court improperly relied on psychiatric testimony to discedit her testimony despite the fact that her mental condition was not in issue. Next, Schleifer argues that the court gave improper weight to the June 1, 1977, incident, because the evidence does not support the court's determination that that incident led to her firing. Third, Schleifer argues that the evidence supports her discrimination claims and that the district court's rulings are clearly erroneous.

A

The principal issue is whether the district court properly admitted psychiatric testimony that Schleifer was unable to assess accurately or interpret events occurring around her. The Hospital's expert psychiatrist testified that Schleifer suffered from significant personality disorders that would cause her to distrust and suspect wrongdoing by those around her without warrant. The psychiatrist stated:

> Well, my opinion of her psychiatric condition on or about September 9, 1981, was that there was still clinical evidence present of an ongoing mixed personality disorder with features primarily of schizoid and paranoia characteristics.
>
> On the basis of my interview with her on September the 9th and including the review of the documents that I alluded to a moment ago, it is my psychiatric

opinion that in the time frame of the litigation in question, 1976-1977, approximately, that in addition to the mixed personality disorder Miss Schleifer demonstrated at that time manifestations of a severe depressive disorder, which at one point I would characterize as either a major depressive disorder or psychotic depressive disorder, depending on a particular nomenclature one would choose, that manifested itself with a brief period of hallucinatory experiences on her part, and also during this time she intermittently demonstrated suicidal ideation.

* * *

Now, the two types of personality disorder that I believe Miss Schleifer demonstrates—and again I want to stress the presentation of these disorders in my opinion was more extreme and apparent in 1976 and 1977, though I believe there were some still ongoing manifestations of the disorders when I saw her in September of 1981—a paranoia disorder is basically manifested by three clusters of symptoms. First is a persuasive, unwarranted suspiciousness and distrust of people.

The second major cluster is hypersensitivity, demonstrated through such things as exaggerating certain kinds of difficulties—making a mountain out of a molehill might be a categorization of that—a readiness to counter-attack when any threat is perceived, and the third cluster of symptoms is a paranoid personality disorder in what is called restrictive effectively or a diminished ability to respond emotionally to certain kinds of situations, giving the individual the impression of being cold, unemotional, unresponsive.

Tr. at 623-25.

The psychiatrist concluded both that Schleifer probably did not experience some of the events she testified about, and that she should not return to work at the Hospital. The psychiatrist gave the following answers:

Q. Doctor, if you had a patient who had been diagnosed as having schizoid personality, a depressive psychosis, paranoid tendencies and the attendant phenomena that come with these conditions, and that patient told you that she had been the recipient over nine years of repeated sexual attacks, physical violence and lies by male co-workers, and that in the nine-year period this patient reported none of this abuse to the management, personnel department or administration at the hospital at which she worked, do you have a reasonably medically certain opinion, Doctor, as to whether the physical and sexual incidents of mistreatment and lies took place?

A. Yes, I do.

Q. What is your opinion?

A. My opinion is that these reports would be best understood and most accurately understood as by-products or manifestations of a disturbed psychological or psychiatric state of mind.

Q. And what is the basis of that opinion?

A. The basis of that opinion is my evaluation of Miss Schleifer, the review of all the records that I have alluded to, and very importantly my own clinical experience in working with individuals who have had this particular constellation of problems both in my clinical practice as well as in my administrative responsibilities as director of a psychiatric in-patient unit at a major medical center for approximately eight years.

Tr. at 631-33. Both catheterization laboratory doctors also testified that Schleifer should not return to work at the Hospital. Tr. at 542, 634-36.

The Hospital offered the psychiatric testimony not to show that Schleifer was fired because of psychiatric problems, but rather to oppose her claim that she should be rehired and to impeach her credibility as a witness. It is the latter basis for admissibility that so troubles Schleifer. She contends that the use of psychiatric testimony was unfair, prejudicial, and improper in that it in-

vaded the province of the trier of fact. The Hospital, on the other hand, argues that the expert psychiatric testimony was relevant to why Schleifer was fired for performance deficiencies. Moreover, the Hospital argues that Schleifer's mental condition was put into issue at the trial when she claimed that she should be reinstated at the Hospital and in her complaint, in which she claims that harassment on the job caused her to need considerable medical care and led her co-worker to spread rumors of her mental instability. Appellee's br. at 25; R. 1 attachment C., at 9-10.

We are hesitant to approve the type of evidence used by the Hospital. The psychiatrist struck at the heart of Schleifer's case when he stated that her mental state likely prevented her from perceiving and recounting the truth. The psychiatrist concluded that Schleifer probably was not a credible witness. It is dangerous to suggest that psychiatrists are better judges of credibility than the trier of fact. And, in any event, credibility determinations are reserved to the trier of fact, and responsibility for such decisions generally should not be given to any witness. As the Ninth Circuit noted in *United States* v. *Barnard,* 490 F.2d 907, 912 (9th Cir.), *cert. denied,* 416 U.S. 959 (1974), jurors, when faced with such powerful psychiatric testimony, might forget their duty to carefully weigh all of the testimony and might lose sight of the central issues in the case.

The admissibility of such testimony is, nonetheless, a decision within the broad discretion of the trial judge, and we will not reverse absent a clear conviction that he erred. See *United States* v. *Gutman,* 725 F.2d 417, 420 (7th Cir. 1984). We are not prepared to adopt the plaintiff's position that psychiatric testimony is never admissible on the issue of credibility in a civil case. A jury should be informed of all material information regarding relevant issues affecting a witness's credibility. *United States* v. *Partin,* 493 F.2d 750, 762 (5th Cir. 1974). Thus the decision whether psychiatric testimony should be al-

lowed hinges on whether a witness's mental capacity has become relevant to her or his credibility. For example, such evidence has not been allowed when alleged mental problems of a witness occurred at a time not relevant to that witness's testimony. *E.g., United States* v. *Diecidue,* 603 F.2d 535, 551 (5th Cir. 1979), *cert. denied,* 445 U.S. 946 (1980). Moreover, psychiatric testimony, if only minimally probative, may be manifestly unfair and thus excludable under Federal Rule of Evidence 403. See *United States* v. *Lopez,* 611 F.2d 44, 45 (45th Cir. 1979). Also, as the Fifth Circuit noted in *United States* v. *Wertis,* 505 F.2d 683, 695 (5th Cir. 1974), *cert. denied,* 422 U.S. 1045 (1975), if the psychiatric testimony relates only to whether the witness would have a tendency to be reliable in distinguishing truth from non-truth rather than a witness's capacity of competency as in *Partin,* then it should not be allowed.

We think the Hospital's expert psychiatric testimony was properly admitted under the particular facts of this case. At trial Schleifer complained that co-workers sexually harassed her by speaking crudely to her and at times touching and fondling her. Her pleadings indicated that these incidents caused her mental difficulties. In addition, she claimed that she was fit to return to work. The Hospital's defense in part was that Schleifer was fired because she made mistakes in the laboratory and was unable to follow established work procedures. The Hospital also claimed that Schleifer was unfit for laboratory work. Therefore although mental problems were not the stated reason for her discharge, Schleifer's mental condition was an issue at the trial.

The psychiatric testimony was offered principally to impeach the witness's credibility. It clearly was relevant for that purpose. And we believe its probative value outweighed any prejudicial effects. Schleifer had a history of mental problems. She once was granted a medical leave of absence due to psychiatric problems, and was in psychotherapy for about one year. The psychia-

trist, after examining Schleifer and reviewing her medical history, determined that she may have imagined incidents of abuse resulting from unwarranted distrust of her co-workers one symptom of her problem. Significantly, Schleifer may not have appeared on the stand to be lying, for she may actually have believed she was telling the truth. The psychiatric testimony thus was especially probative of her credibility. Finally, the case was tried to the judge, who is better able than the jury to understand the relevance of the testimony. The testimony directly addressed the witness's capacity and competence, not merely whether she told the truth. The district court did not abuse its discretion by admitting the testimony.

B.

Schleifer's remaining claims all relate to whether she successfully proved and whether the Hospital successfully defended against a case of sex discrimination. The record amply supports the district court's ruling that Schleifer failed to prove a case of discrimination. In regard to the pay discrimination claim, trial exhibits revealed that she was paid at least as much as, and for some of the time more than, her male co-worker until she was fired. Schleifer's testimony does not contradict that evidence. Moreover, her co-worker had somewhat different job responsibilities. He was hired to maintain and repair the catheterization laboratory's electronic equipment in addition to performing regular technician duties. In addition, Schleifer's testimony in regard to the type of tasks to which she and her co-worker were assigned did not indicate in any way that she worked at less attractive jobs because of her sex. No evidence in the record indicates that the district court erred in ruling that Schleifer failed to show a *prima facie* case of discrimination.

In any event, the Hospital's evidence that Schleifer was fired because of poor job performance and refusal

to conform to laboratory rules is unrefuted. Schleifer did not deny the occurrence of the June 1, 1977, incident in the laboratory, but rather testified only that there was no serious emergency. Schleifer admittedly often was late for work, and she did not keep her time card in its proper place (because she thought other people were taking it). The record supports the district court's ruling that the Hospital had legitimate reasons for firing Schleifer.

C.

The particular facts of this case justify the district court's decision to admit expert psychiatric testimony regarding the plaintiff's credibility. When such testimony is relevant to the time and events about which the witness is testifying and is highly probative of the witness's capacity and competency, then its value may outweigh any prejudicial effects and potential unfairness to the witness.

The plaintiff failed to show any instance when she was treated differently at the Hospital on account of her sex. Her evidence regarding salary and job assignments do not indicate sex-based discrimination. Furthermore, the Hospital's evidence of legitimate, business-related reasons for the plaintiff's firing were not rebutted.

AFFIRMED.

APPENDIX B

In The
UNITED STATES DISTRICT COURT
For The Northern District of Illinois
Eastern Division

ROBERTA D. SCHLEIFER,

Plaintiff,

vs.

THE CHILDREN'S MEMORIAL HOSPITAL,

Defendant.

Civil Action
No. 80 C 4480

MEMORANDUM OPINION AND ORDER

This is a Title VII action in which the plaintiff, alleged and sought to prove sex discrimination in employment. Plaintiff, Roberta Schleifer, was employed by the Children's Memorial Hospital (Chicago) on October 28, 1969. She received a final termination on August 23, 1977. During most of this time, she worked as a Cardiovascular Catheterization Technician ("Cath Tech") in the Department of Cardiology of the hospital.

Cardiac catheterization is part of a diagnostic test in the course of which a tube is inserted into a vein in the child's leg and thence through the vein all of the way to the heart. The doctor, by measuring through this tube the pressures in each of the several chambers of the heart is assisted in diagnosing what preliminary examinations indicate may be heart problems. The catheterization Lab is a small but very important and generally quite busy unit in the hospital's Department of Cardiology. It is manned by a small number of technicians who after learning to perform most of its various procedures generate to one or another of a limited number of functions.

They work under a doctor called the Medical Supervisor of the Cath Lab who in turn is under the head of the Department of Cardiology. The various positions or stations within the Lab are all in close proximity one with the others, and the position titles given the technicians are more prefunctory than actual. They reflect more the hospital's program of inter-grade advancement than they do the relative proficiency of the technician. And since the whole procedure is relatively recent in child hospitalization, it is understandable that the plaintiff, one of the senior most technicians, helped train incoming new technicians, and from time to time took on highly responsible tasks with relatively comparable advancements in duties and salary. This was ordinary in the experiences of the technicians across the board.

As in hospitals generally in the Cath Lab, almost every other situation is an emergency in which delays, mistakes, lack of team coordination and lack of intra-team rapport could prove critical, if not fatal, to an infant patient. Many of the patients were newly born infants. When the setting and drama of this probably not unusual hospital staff experience unfolded before the judge as trier of facts in this trial of a Title-VII case, he (I) could readily see the importance to good hospital departmental administration of a combination of high skills, duplicity in task performing abilities, mutual respect among all of the members of a team, the need for each team member to be able to rely upon each of the others, a mutual accommodation of personality differences within limits that avoid team member toleration, and the absence among the team of jealousies, distrusts, chauvinisms and fears.

The principal eye witnesses in this case were some of the lab technicians and staff doctors during the nine years of Miss Schleifer's employment. A most important witness was an expert, a neuro-psychiatrist, who with a limited amount of person to person contact with Miss Schleifer, but with a thorough study of the records of another doctor, a treating psychiatrist of whom the plaintiff had been a patient during and after a nine month

medical leave given in 1976, testified at length in both scientific and lay terms about the plaintiff.

The plaintiff's testimony continued over several days. She told of her beginnings with the job. She explained with clear detail that as time went on male technicians whom she herself had trained were given advancements over her, that eventually she was given menial tasks not assigned to males, that she was even denied certain specialized training that was given to males, that she ended up receiving less pay and fewer benefits than males, and that finally, by both the technicians and the doctor supervisors, she was slandered, attacked, assaulted, molested and sabotaged. The details as in most sex harrassment cases were not in depth. The subject matter is delicate and lawyers generally don't follow through to show that what was claimed to have happened was actually something else.

The plaintiff's demeanor on the witness stand was excellent. She listened to the questions asked her and answered them directly. She was alert, and had a strength that kept her from withdrawing when under examination about her psychological problems. Had the case rested upon her direct testimony alone, she would have established that her termination was the culmination of years of plotting and mistreatment on the part of her male co-workers. But that was not the case.

Whether or not it were found that she made a prima facie case of harrassment, I find from *all of the evidence* that there would be no doubt in the mind of the reasonable person that the plaintiff's case is a tragic example of an employer slowly discovering that it had in a sensitive position an employee whose record of effectiveness began deteriorating after a number of years of responsible employment, who eventually had to be given 90 days of medical leave for what her treating doctor determined was a paranoia with "schizoid personality", "significant endozenous depression with increasing psychotic depression and hallucinations". When she returned to work from her sick leave her conduct was not improved. She

progressively became a serious occupational problem for the hospital. Her timing was erratic, and she began absenting herself from the laboratory for long periods of time. She became unable to handle small matters consistently, such as maintaining the lab's stock of supplies, or maintaining them in regular or sensible places. Finally in June of 1971, when acting as Cath Tech, it became her responsibility to place a heating pad under a baby's body and insert a rectal temperature probe to monitor the baby's body temperature. During the procedure, plaintiff failed completely to insert the rectal probe, and during the actual catheterization she recorded a body temperature that was so low as to be inconsistent with life without reporting the temperature to the doctor. Fortunately the attending nurse implemented an emergency procedure which kept the infant alive. This almost "cracking-up" type of conduct worsened as the month of June, 1977 wore on. A grievance under the Hospital's grievance procedure was instituted on June 15th which resulted in her termination a few weeks later.

The evidence is overwhelming that there just was no sex discrimination in this case. There was no mistreatment in regular employment matters because of plaintiff's sex. There just was no harrassment because of her sex, and no termination because she wouldn't yield to the doctors' desires to "fondle her breasts".

I find that the plaintiff failed to make out a prima facie case. And considering all of the evidence in the record, the plaintiff's termination did not constitute a violation of Title VII of the Civil Rights Act of 1964 Section 42 U.S.C. 2000e-5, 2000e-5(g). This memorandum shall constitute my findings of fact and conclusions of law. Judgment for the defendant.

Enter:

(Signed)
JAMES B. PARSONS
United States District Court Judge

Dated: March 24, 1983